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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002120-MR

CASSANDRA SMITH — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 04-CR-000637

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD,[1] NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Cassandra Smith ("Smith") has appealed from the September 7, 2006, judgment of the Jefferson Circuit Court, following a multi-day jury trial, finding her guilty of possession of a controlled substance in the first degree (cocaine)[2] and

[1] Judge James I. Howard concurred in this opinion prior to the expiration of his appointed term of office on December 6, 2007. Release of the opinion was delayed by administrative handling.

[2] Kentucky Revised Statutes (KRS) 218A.1415, a Class D felony.

possession of drug paraphernalia,[3] and sentencing her to a total of three years' imprisonment, probated for a period of five years. For the following reasons, we affirm.

On April 24, 2003, officers from the Louisville Metro Police Department ("LMPD") executed a search warrant at Smith's residence located on South 15th Street in Louisville, Kentucky. Upon entry, Sergeant Yvette Gentry ("Sgt. Gentry") located Smith in her bedroom and immediately placed her in handcuffs for safety purposes and to ensure she was unable to destroy any potential contraband. She was not placed under arrest at that time. Sgt. Gentry asked Smith if she had any weapons or drugs on her person. Smith stated she had drugs in her pocket. Sgt. Gentry retrieved a small plastic bag containing four individually wrapped pieces of crack cocaine from Smith's front left pants pocket and placed Smith under arrest for possession of a controlled substance. Sgt. Gentry then took Smith to the living room to await completion of the search of the residence.

Lead Detective Scott Gootee ("Det. Gootee") was present in the living room when Smith entered, as were Smith's two minor daughters. One of the children was very upset, prompting Det. Gootee to inquire of Smith as to whether there was somewhere the two girls could be taken so they would not have to witness the remainder of the search warrant execution. Smith responded by saying "her daughters knew what was going on and that she had talked to them about the possibility that some day the police may come

[3] KRS 218A.500, a Class A misdemeanor.

by." She further stated that she was not a big drug dealer, but rather she sold only small amounts "to get by."

On February 24, 2004, a Jefferson County grand jury returned an indictment charging Smith with trafficking in a controlled substance in the first degree[4] and possession of drug paraphernalia. Smith filed a pre-trial motion to suppress the statements she had made during the execution of the search warrant, and a hearing on the motion was held on March 20, 2006. Following a lengthy hearing, the trial court granted Smith's motion to suppress, finding Smith had not been read a proper *Miranda*[5] warning. The Commonwealth promptly filed a motion to reconsider the ruling. On March 30, 2006, the trial court ruled the statements were admissible on two grounds. First, Smith was not in custody at the time she made the statement in the bedroom, *citing Taylor v. Commonwealth*, 182 S.W.3d 521 (Ky. 2006), and second, the statements made in the living room were not in response to any police inquiry designed to elicit an incriminating response, *citing Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

Smith proceeded to a jury trial on March 29-31 and April 3-4, 2006. The jury found her guilty of possession of a controlled substance in the first degree and possession of drug paraphernalia. Smith then agreed to a sentence of three years' imprisonment conditioned on the Commonwealth not opposing probation and Smith

[4] KRS 218A.1412, a Class C felony.

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

reserving her right to appeal from the conviction. On September 7, 2006, the trial court entered a final judgment and sentence of probation in accordance with the terms of the sentencing agreement. This appeal followed.

I. SUPPRESSION ISSUES

Smith first contends the trial court erred in failing to suppress the statements she made during execution of the search warrant. On appellate review of a trial court's denial of a suppression motion, we first review the factual findings for clear error. If the findings are supported by substantial evidence they are considered conclusive and will not be disturbed. CR[6] 52.01, *Stewart v. Commonwealth*, 44 S.W.3d 376 (Ky.App. 2000). This is followed by *de novo* review of the trial court's legal conclusions. *Id*. *See also McQueen v. Scroggy,* 99 F.3d 1302, 1310-1311 (6th Cir. 1996).

The trial court held multiple hearings on the suppression motion before ultimately denying the motion. Neither Smith nor the Commonwealth has challenged the trial court's factual findings, and a careful review of the record reveals the findings were supported by substantial evidence. Thus, we hold these findings to be conclusive as to the suppression motion.

Although the trial court initially held as a matter of law that Smith had not been given her *Miranda* warnings and suppressed her statements on that basis, it later reversed its decision and stated new legal conclusions. It is these latter conclusions that

[6] Kentucky Rules of Civil Procedure.

are properly before us for review. The trial court and the parties have framed the issues based upon the location where the statements were made--the bedroom and the living room. We shall follow suit.

A. BEDROOM STATEMENT

Smith first contends the trial court erred in failing to suppress her statement made in the bedroom that she had drugs in her pocket, claiming she was in custody when the statement was made and had not been given her *Miranda* warnings. Further, she claims the trial court's reliance on *Taylor, supra*, was misplaced. We disagree.

Unquestionably, if a suspect is in police custody *Miranda* requires officers to advise her of her constitutional rights prior to commencing any interrogation intended to elicit incriminating statements. Conversely, if the suspect is not in custody, no warnings need be given under *Miranda*. *See Commonwealth v. Lucas*, 195 S.W.3d 403, 406 (Ky. 2006). Here, Smith was placed in handcuffs almost immediately after officers encountered her in the bedroom. Testimony elicited at the suppression hearing and at trial revealed this detention was for officer safety and to prevent Smith from destroying or concealing any contraband while the search warrant was being executed. We hold Smith was not in police custody simply because she was placed in handcuffs while the officers completed their search and investigation. *See Taylor, supra*; *United States v. Foster*, 376 F.3d 577, 587 (6th Cir. 2004) (discussing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Therefore, no *Miranda* warnings were necessary, and the trial court correctly so ruled in denying the motion to suppress the bedroom statement.

Smith alternatively contends that even if she was not in custody when she voluntarily informed the officers she had drugs in her pocket, a violation under *Miranda* occurred when Officer Gentry specifically questioned whether she had drugs or weapons on her person. Again, we disagree.

It is well-settled that when officers ask questions intended to secure their own safety or that of the public which are not solely intended to elicit incriminating statements, *Miranda* warnings are unnecessary. *New York v. Quarles*, 467 U.S. 649, 659, 104 S.Ct. 2626, 2633, 81 L.Ed.2d 550 (1984). *See also United States v. Talley*, 275 F.3d 560 (6th Cir. 2001). This so-called "safety exception" to *Miranda* has been extended to include questioning about illegal drugs where officers are concerned about evidence thereof which might be uncovered in a search. *United States v. Luker*, 395 F.3d 830 (8th Cir. 2005).[7] Police officers executing a search warrant are keenly aware of their surroundings and can reasonably be expected to distinguish between questions necessary for their own protection and those designed to obtain incriminating evidence. *Quarles, supra*, 467 U.S. at 659, 104 S.Ct. at 2633. Further, *Miranda* does not preclude questions regarding the location of contraband, especially in situations such as in the case *sub judice* where a suspect is detained but is not in custody. *Foster, supra*. It would have been plainly unreasonable, if not inept police work, for the officers herein to have simply allowed Smith to wander about without at least cursory questioning regarding contraband

[7] Although the decision in *Luker* concerned needles associated with methamphetamine use, we see no reason the holding should be limited to such substances.

considering the circumstances under which the officers came to be present in her home, that is, in order to execute a search warrant. *See United States v. Erwin*, 155 F.3d 818, 823 (6th Cir. 1998).

The trial court's factual findings were supported by substantial evidence, as was the decision to deny the suppression motion, and these determinations are therefore conclusive and will not be disturbed in this appeal. RCr[8] 9.78; *Canler v. Commonwealth*, 870 S.W.2d 219 (Ky. 1994); *Morgan v. Commonwealth*, 809 S.W.2d 704 (Ky. 1991). Further, the trial court's reliance on *Taylor, supra*, was correct and its legal reasoning was sound. Thus, there was no error in the admission of the incriminating statements made in the bedroom.

B. LIVING ROOM STATEMENTS

Smith next contends the trial court erred in failing to suppress two other statements made after she entered the living room: first, that her daughters "knew what was going on" and actually expected the police to some day come by; and second, that she was not a big drug dealer, but only sold small quantities "to get by." She contends she was subjected to the functional equivalent of a custodial interrogation without having first been read a proper *Miranda* warning, and further that the trial court's reliance on *Rhode Island v. Innis, supra*, was erroneous. We disagree.

It is undisputed Smith was in custody at the time she was brought into the living room as she had been placed under arrest following the recovery of narcotics from

[8] Kentucky Rules of Criminal Procedure.

her person in the bedroom. Thus, if Smith were to be subjected to an interrogation, she was entitled to be read her constitutional rights prior to such questioning, as clearly mandated by *Miranda*. However, such warnings are not required if a suspect is in custody but no interrogation takes place. *Watkins v. Commonwealth*, 105 S.W.3d 449, 451 (Ky. 2003) (citing *Rhode Island v. Innis, supra; Port v. Commonwealth*, 906 S.W.2d 327 (Ky. 1995)). The term "interrogation" includes:

> any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect . . . focus[ing] primarily on the perceptions of the suspect, rather than the intent of the police.

Wells v. Commonwealth, 892 S.W. 2d 299, 302 (Ky. 1995) (quoting *Rhode Island v. Innis, supra*, 446 U.S. at 301, 100 S.Ct. 1689).

In the case *sub judice*, Det. Gootee testified Smith's statements were in response to his inquiry as to whether there was a different location her children could be taken during the execution of the search warrant. In no way can we perceive how such an innocuous question could be interpreted as an attempt to elicit an incriminating response. The mere fact that Smith's responses were self-incriminating does not somehow transform Det. Gootee's simple inquiry into an interrogation. The trial court found Smith presented no evidence that any improper questioning occurred prior to her making this statement. This factual finding was clearly supported by substantial evidence and is therefore conclusive. RCr 9.78; *Canler, supra*; *Morgan, supra*. Further, the record reflects no interrogation occurred and no *Miranda* violation occurred. Therefore, the trial court's

reliance on *Rhode Island v. Innis* was correct. There was no error in admitting the living room statements.

II. EXCLUSION OF EVIDENCE

Smith's final contention is that the trial court erred in excluding evidence of her husband's prior drug convictions which she sought to introduce in an attempt to prove the drugs found on her person actually belonged to him. The trial court ruled the evidence was inadmissible as irrelevant and improper for the jury's consideration. Smith argues before this Court that the trial court's decision deprived her of the ability to present an "alternate perpetrator" defense pursuant to *Harris v. Commonwealth*, 134 S.W.3d 603 (Ky. 2004).

During the trial, Smith contended her husband, Armon Perry ("Perry"), had come by her house a few hours prior to the arrival of police and had slipped something into her pocket which she believed at the time to have been money. Smith's counsel requested an investigator interview Perry to obtain a statement from him regarding his activities on the date of Smith's arrest. Perry, although incarcerated on the date the search occurred, was out on work release and did not deny his presence that day at Smith's residence. However, he refused to testify at trial on Fifth Amendment grounds and the trial court declared him to be an unavailable witness. Portions of his interview were allowed to be admitted through the investigator's testimony. Smith then moved to introduce evidence of Perry's three prior drug-related convictions under KRE[9] 404(b),

[9] Kentucky Rules of Evidence.

arguing this evidence would demonstrate Perry's motive, intent, and plan to deal drugs, and would support the defense theory that Perry had slipped the drugs into Smith's pocket without her knowledge. The trial court denied the motion, but allowed Smith to place the evidence in the record by way of avowal testimony from a Jefferson Circuit Court deputy clerk. Smith contends the trial court's denial rises to the level of reversible error. We disagree.

In order for evidence of an alleged alternative perpetrator ("aaltperp") to be admissible, there must be a direct connection between the aaltperp and the offense charged. *Harris, supra*, 134 S.W.3d at 608. Evidence which merely tends to show another person had the motive or opportunity to commit the crime is insufficient to raise a reasonable doubt about a defendant's guilt, but rather, there must be direct or circumstantial evidence linking the third party to perpetration of the crime for which the defendant stands charged, *Id.* (citing *People v. Jackson*, 110 Cal.App.4th 280, 1 Cal.Rptr.3d 561, 565 (2003), and the decision of whether to admit such evidence rests within the sound discretion of the trial court. *Id.* (citing *State v. Ortiz*, 252 Conn. 533, 747 A.2d 487, 509 (2000)).

After a careful review of the record, we are unable to conclude Smith presented sufficient evidence of a direct or circumstantial link between Perry's presence at her residence and her possession of narcotics which would permit introduction of the proffered KRE 404(b) evidence. Perry was incarcerated at the time of the charged offense, thus making it highly unlikely he would have had the ability to obtain illicit

substances. Further, Det. Gootee testified his surveillance of the residence revealed a black female repeatedly came to the front door of the residence in response to heavy foot traffic. Smith's own statements to officers that she had drugs in her pocket and that she was not a big drug dealer clearly contradict her testimony that she was unaware of the nature of the item Perry had allegedly given her earlier. Even if jurors believed Smith had gotten the drugs from Perry, this would not serve to exculpate her from the criminal offense of possessing the narcotics. Perry's prior criminal history can in no way be seen as relevant to the criminal offense for which Smith stood charged. The mere fact he had previously been convicted of drug-related offenses does not tend to make any fact in controversy more or less probable, nor do these convictions tend to inculpate Perry as an aaltperp. The trial court correctly found the proffered evidence to be irrelevant and inadmissible, and did not abuse its discretion in excluding Perry's prior criminal record.

For the foregoing reasons, the judgment and sentence of the Jefferson Circuit Court is affirmed.

NICKELL AND TAYLOR, JUDGES, CONCUR.

HOWARD, JUDGE, CONCURS, BUT FILES SEPARATE OPINION.

HOWARD, JUDGE: I concur in the result of the majority opinion. I agree fully with that opinion as to the issues involving the statements made by Smith in the living room and the evidence of her husband's prior record. As to the statement made by Smith in the bedroom, acknowledging that there were drugs in her pocket, I concur only because I believe we are bound by the Kentucky Supreme Court's opinion in *Taylor v.*

Commonwealth, 182 S.W.3d 521 (Ky. 2006). I write separately because I respectfully disagree with *Taylor* and believe the law set out therein should be changed.

The statement made in the bedroom, that Smith had drugs in her pocket, was clearly the result of questioning, or "interrogation" by the officer, whose first words to her, after bursting into the room and placing her in handcuffs, were to ask if she had any weapons or drugs. It is agreed that she had not yet been advised of her *Miranda* rights. Therefore, the only question must be whether or not she was "in . . . custody or otherwise deprived of [her] freedom of action in any significant way," *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

Taylor holds that being placed in handcuffs does not constitute such "custody," or deprivation of freedom of action, so as to make *Miranda* applicable. I respectfully disagree, as do, it appears, the majority of authorities from other jurisdictions. *See* LaFave, et al., *Criminal Procedure* §6.6(f), at 538-539, "A court . . . is likely to find custody if there was physical restraint, such as handcuffing, drawing a gun, holding by the arm, or placing in a police car" (internal footnotes omitted). *See also United States v. Smith,* 3 F.3d 1088 (7th Cir. 1993); *United States v. Henley,* 984 F.2d 1040 (9th Cir. 1993); *People v. Mangum,* 48 P.3d 568 (Colo. 2002); *Dixon v. Commonwealth,* 613 S.E.2d 398 (Va. 2005); *State v. Lescard,* 517 A.2d 1158 (N.H. 1986); *Commonwealth v. Medley,* 612 A.2d 430 (Pa. 1992); *State v. Miranda,* 672 N.W.2d 753 (Iowa 2003).

The ironically named *State v. Miranda, supra,* is factually very similar to this matter. In that case, the police suddenly entered the house uninvited, found the

defendant in his bedroom, handcuffed him, brought him to his living room where other people were present, and asked, "whose marijuana is this?" The Supreme Court of Iowa ordered the statement suppressed, holding that under these circumstances, "a reasonable person, in the [defendant's] position would understand himself to be in custody." *Id.* 672 N.W.2d at 759.

Nonetheless, the law in Kentucky is set out in *Taylor,* which holds that a suspect is not in custody, for *Miranda* purposes, even if handcuffed, apparently unless he or she is placed under arrest.[10] The only authority cited for this proposition is *United States v. Foster,* 376 F.3d 577 (6th Cir. 2004). However, Foster did not deal with *Miranda* rights at all. It merely held that handcuffing a subject was not necessarily inconsistent with a brief, investigatory stop under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); that is, it does not automatically transform a *Terry* stop into an arrest. But it is well established that a *Terry* stop may rise to the level of "custody," for purposes of *Miranda,* without constituting an arrest. *See United States v. Smith, supra; People v. Mangum, supra; Dixon v. Commonwealth, supra.* In *United States v. Smith,* the Seventh Circuit Court of Appeals dealt with this very issue. The court held that there was a legitimate investigative stop under *Terry,* and that briefly handcuffing the suspect did not transform that *Terry* stop into an arrest, but nonetheless went on to state,

[10] *Taylor* does not expressly hold that there must be a formal arrest to implicate *Miranda.* But there is no suggestion of what other facts might constitute custody.

> [W]e must decide whether Stewart was in custody for *Miranda* purposes when Officers Twing and Peregoy questioned him . . .
>
> Thus our inquiry into the circumstances of temporary detention for a Fifth and Sixth Amendment *Miranda* analysis requires a different focus than for a Fourth Amendment *Terry stop*. . . .
>
> The purpose of permitting a temporary detention without probable cause or a warrant is to protect police officers and the general public. . . .
>
> The purpose of the *Miranda* rule, however, is not to protect the police or the public. "[T]he basis for [the] decision was the need to protect the fairness of the trial . . . ," and "[t]here is a vast difference between those rights that protect a fair trial and the rights guaranteed under the Fourth Amendment." . . . Accordingly, a completely different analysis of the circumstances is required. . . .
>
> The Supreme Court has instructed us that when a temporary detention takes place, *Miranda* becomes applicable whenever "'a person has been taken into custody *or otherwise deprived of his freedom in any significant way*. . . .'" . . . *Berkemer* thus underscores that Fifth and Sixth Amendment rights are implicated before a defendant has been arrested. . . .
>
> Prior to Officer Twing's questioning, Stewart had been frisked, placed in handcuffs and told to sit at a specific place by the side of the road. At that time, the defendants were outnumbered by the police officers. Stewart was not free to go anywhere. . . .
>
> Under these circumstances, there was sufficient curtailment of Stewart's freedom of action to establish custody for *Miranda* purposes.

Id. 3 F.3d at 1096-1098 (internal citations and footnotes omitted) (emphasis in original).

Under *Miranda* and its progeny, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). Would the suspect, Smith in this case, reasonably have believed she was in custody, or that she was free to leave? It is hard to imagine a situation in which a subject, placed in police handcuffs, could reasonable believe she was free to go. Would she also be free to take with her the handcuffs, which were police property?

Based on the foregoing authorities and analysis, I would find Smith, once handcuffed, to have been in custody for purposes of *Miranda,* and order the statement made in her bedroom suppressed. However, since we are bound to follow *Taylor,* I reluctantly concur in the majority opinion.

BRIEF FOR APPELLANT:

Elizabeth B. McMahon
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky